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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

AGENCY—SCOPE OF PERMISSION UNDER THE OMNIBUS CLAUSE—VIOLATION OF RULES

New York Casualty Co. v. Lewellen[1]

The plaintiff insurance company issued a policy of automobile liability insurance to one Sutton, a Missouri resident, as the named insured. The policy by reference incorporated the Missouri Vehicle Safety Responsibility Act, which provides that all policies of automobile liability insurance issued pursuant thereto shall

1. 184 F. 2d 891 (8th Cir. 1950).

"insure the person named therein and any other person using or responsible for the use of said motor vehicle . . . with the express or implied permission of the said insured."[2] This clause is commonly referred to as the "omnibus clause." Sutton was a construction contractor. Lewellen, his general foreman, had permission to use Sutton's truck during working hours, to drive it to and from work and to stop on the way to attend to personal business. Sutton instructed the employees to park the truck and call him if they took a drink while driving. In violation of this instruction, Lewellen, while en route home from work, stopped at a bar, drank some beer, and then continued driving to a point where he became involved in a collision. Plaintiff insurance company brought this action for a declaratory judgment in the federal court to determine whether Lewellen was an additional assured within the terms of the policy issued to Sutton. Plaintiff's contention was that Lewellen had violated an express instruction not to drive while drinking and therefore had no permission to drive the truck at the time of the accident and was not within the coverage of the "omnibus clause." The United States Court of Appeals, relying upon a Missouri case,[3] affirmed a decision of the district court that the violation of the no-drinking rule was not sufficient to terminate automatically Sutton's permission to use the truck.

The purpose of the omnibus clause is to create additional assureds from those who are driving a vehicle with the express or implied permission of the named assured.[4] An employee may be given permission to use the vehicle within the scope of the employer's business, or to use it for the employee's own personal benefit or to use it for both of these purposes. It would seem that Lewellen's permission was of the last type, *i.e.* permission to use the vehicle both for the employer's business and for Lewellen's personal benefit. Obviously, the use of the truck during working hours would be within the scope of Lewellen's employment but one might well question whether the use of the truck to go to and from work was within the scope of employment.[5] When permission is given to use the vehicle outside the scope of employment, the relationship of employer-employee ceases and a bailor-bailee relationship begins. A collateral issue, when a commercial vehicle is involved, arises in policies containing a provision which limits coverage to commercial uses. Under such a provision, it is questionable whether permission to use the vehicle for personal uses will extend the coverage of the policy to the bailee.[6] Apparently no provision of this type was in the policy involved in the principal case. It is conceded that Lewellen had permission to use the truck in the first instance. The question is how much deviation from such permitted use is necessary to terminate this initial permission.

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2. Mo. Rev. Stat. § 303.210 (1949).
3. Rainwater v. Wallace, 169 S.W. 2d 450, 456 (Mo. App. 1943); *aff'd*, 351 Mo. 1044, 174 S.W. 2d 835, 838 (1943); 5 A.L.R. 2d 641 (1949).
4. Farm Bureau Mut. Auto. Ins. Co. v. Daniel, 104 F. 2d 477 (4th Cir. 1939); Nyman v. M-I Garage Co., 211 La. 375, 30 So. 2d 123, 125 (1947); 45 C.J.S. § 829, p. 894.
5. See Smith v. Fine, 351 Mo. 1179, 175 S.W. 2d 761 (1944); but *cf.* O'Hare v. Flint Cleaning Co., 170 S.W. 2d (Mo. App. 1943).
6. Gray v. Sawatzki, 291 Mich. 491, 289 N.W. 227 (1939).

The courts are not agreed on the extent of deviation permitted. Some courts apply a narrow rule saying that permission to use the vehicle for one purpose does not imply permission to use it for every purpose.[7] Under this rule, permission must have been given for the particular use being made of the vehicle at the time it was involved in the accident. If the permission is limited to use within the scope of employment, the scope of permission is co-extensive with the scope of employment and it does not include permission to use for other purposes. A more liberal rule, applied by other courts, requires only that permission be given in the first instance.[8] Under this rule, a substantial deviation from the permitted use will not preclude the employee from being an additional assured within the terms of the omnibus clause. If the employee's permission is to use the vehicle only within the scope of employment, he may nevertheless be an additional assured even though his deviation has been so great that it would absolve his employer from tort liability for his conduct under the doctrine of respondeat superior.

Under a third rule, the minor deviation rule, minor deviations from the permitted use are not considered as terminating the original permission.[9] This rule seems to be the one followed in Missouri, where the permission in the first instance is limited to use within the scope of employment. In *Rainwater v. Wallace*,[10] cited in the principal case, the employee of a tree surgeon used his employer's truck in connection with the inspection of trees in the yard of a real estate agent. The inspection was within the scope of his employment but the employee also intended to obtain a list of houses from the real estate agent for his own personal purposes. An accident occurred while the employee was on a street leading to both places, the office and the house of the real estate agent being but two blocks apart. The court in *Rainwater v. Wallace* said, "It is the well established rule in this state, that a servant does not step without the scope of his employment, as a matter of law, by joining some private business of his own with that of his master's, except where he makes a marked deviation from his employer's business." Thus, in the *Rainwater* case, the court seemed to imply that scope of employment has an important bearing on the scope of permission under the omnibus clause where the permission was given to use the vehicle incident to the employment.

The significance of the statutory requirement that an omnibus clause be included in the liability policy has not been decided by the Missouri Courts. The cases relied on in *Rainwater v. Wallace* involved the master's liability for his servant's torts and did not involve the scope of permission under the omnibus clause. However, the Missouri cases indicate that a minor deviation would not remove the employee from the scope of employment so as to free the employer from tort lia-

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7. Johnson v. American Auto. Ins. Co., 131 Me. 288, 161 Atl. 496 (1932); Laroche v. Farm Bureau Mut. Auto. Ins. Co., 325 Pa. 478, 7 A. 2d. 361 (1939).

8. Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 Atl. 866 (1924); see dissent: Stowall v. New York Indem. Co., 157 Tenn. 301, 8 S.W. 2d 473 (1928).

9. However, courts applying the narrow rule might permit slight deviations. See Laroche v. Farm Bureau Mutual Auto. Ins. Co., *supra*, n. 7.

10. *Supra*. n. 3.

bility. A frequently cited case on this point is *Guthrie v. Holmes.*[11] In that case, a chauffeur was to drive the car back to the defendant's home after making an errand. Instead the chauffeur went on a five hour drinking spree and became involved in an accident. The court said, "By what we have written above, we do not mean to say that slight deviations from a direct route to the defendant's garage would exonerate the master from the negligence of the servant. . . ." *Guthrie v. Holmes* is cited in a later case, *Fidelity & Casualty Co. v. Kansas City Rys.*,[12] which held that the fact that a chauffeur returning to defendant's garage intended to stop for dinner was not sufficient deviation to exonerate the employer. In *Slothower v. Clark*,[13] the chauffeur had instructions to pick up defendant's son. The chauffeur went in another direction on his own business and on return had an accident. The court said that mere orders do not absolve the master from liability. In the above cases, the scope of permission was limited to the scope of employment. It is submitted that the same rule should be applied when the permission is for a purpose other than within the scope of employment. Minor deviations from the permitted use should not prevent the permittee being an additional assured under the omnibus clause. In the principal case, the employee was violating to some extent an express instruction. However, in light of the Missouri decisions above quoted, it would seem that the federal court was correct in saying that such violation is not sufficient to terminate automatically the employer's express permission for the actual use of the vehicle at the time an accident occurs.

MONTGOMERY WILSON

PROPERTY—ADVERSE POSSESSION UNDER UNRECORDED DEED

King v. Fasching[1]

Shaw v. Armstrong[2]

In *King v. Fasching,* Barrow purchased the property in question at a sheriff's sale by deed dated March 5, 1935, recorded March 23, 1935. Barrow conveyed to Robert and Dorothy King by quit-claim deed on April 8, 1935. The Kings also obtained a warranty deed dated April 9, 1935 from the prior owner against whom the sheriff's sale was held. The Kings did not promptly record their deeds, but went into immediate possession and remained in possession continuously from the date of the conveyance from Barrow until this suit to quiet title was started by plaintiff, Dorothy King, against defendants. The Kings made major improvements on the property and paid all taxes up to and including those for 1947 except the 1946 city taxes. Robert King, plaintiff's husband, died August 26, 1948. When plaintiff

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11. 272 Mo. 215, 198 S.W. 854, 859 (1917).
12. 207 Mo. App. 137, 231 S.W. 277, 278 (1921); see also Hubbard v. Lockjoint Pipe Co., 70 F. Supp. 589, 593 (E.D. Mo. 1947); Schulte v. Grand Union Tea Coffee Co., 43 S.W. 2d 832 (Mo. App. 1931); Gerry v. Boehmer Coal Co., 241 S.W. 976 (Mo. App. 1922).
13. 191 Mo. App. 102, 179 S.W. 55 (1915).
1. 234 S.W. 2d 549 (Mo. 1950).
2. 235 S.W. 2d 851 (Mo. 1951), *infra* note 9.

returned from work one evening in November 1948, she found a note from defendants to come to see them. When she did so, she was informed by Mrs. Fasching that defendants had purchased the property at a sale for delinquent 1946 city taxes. The report of the case does not show the date of defendants' deed from the tax sale nor the date of its recordation. Defendants had also obtained a quit-claim deed from Barrow, plaintiff's grantor, dated December 7, 1948, which recited (as shown by transcript) ten dollars consideration, and recorded December 8, 1948. The defendants contended that their purchase of the property at the tax sale cut off any interest which the plaintiff had under the unrecorded deeds, leaving plaintiff with no interest in the property sufficient to permit her to contest the defendant's tax title on the basis of grossly inadequate consideration. The court held that plaintiff had perfected her title by adverse possession for more than ten years, and that such title was sufficient upon which to base an action challenging defendant's tax title.

This decision raises the question whether a party receiving title under a valid and recordable deed and who fails to record that deed, must claim under such title, or whether in the alternative he can claim under an original title perfected by adverse possession. Adverse possession implies possession which is adverse to an interest of another party. But in the principal case, plaintiff was the only person who held an interest in the property prior to the purchase by defendants at the tax sale. Even though plaintiff's deed was not recorded, it was good as against her grantor.[3] Defendants' interest in the property did not accrue until their purchase at the tax sale, less than one year prior to the suit to quiet title. Therefore, prior to the tax sale no one other than plaintiff had an interest in the property.

But if the problem is approached from the viewpoint of the title of plaintiff being defective, the result reached by the court in the principal case appears more logical. Under our system of recording, an unrecorded deed in a chain of title creates a gap in the record which may not become apparent for many years. Since the very purpose of the recording statutes is to provide a system by which the state of title to realty can be determined by a check of the record alone, it is not unreasonable that an unrecorded deed be considered to create a defect in title. In addition, the failure to record a deed gives rise to circumstances which render it possible for a subsequent purchaser from the record owner, without actual notice of the prior unrecorded deed, to take free of such unrecorded deed. The recordation being a part of the conveyance, at least as to third parties, it can be said that full title has not passed until the deed is recorded. In *Glass v. Lynchburg Shoe Co.*,[4] Borland conveyed to Wray, but Wray failed to record his deed. Shortly thereafter, Wray executed a deed to Glass dated July 27, 1912. Glass recorded his deed, took possession and was in actual possession from the date of the conveyance to him

3. Mo. Rev. Stat. § 442.400 (1949), Mo. Rev. Stat. Ann., § 3428—"No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

4. 212 N. C. 70, 192 S.E. 899 (1937).

until the time when defendant obtained a judgment against Borland, November 16, 1925. In 1935, defendant levied on the property held by Glass in execution of the judgment against Borland. Plaintiff brought suit to enjoin the sale of the property under the levy. The Supreme Court of North Carolina held that the unrecorded deed did not convey complete title to the property under the recording acts of North Carolina,[5] therefore the conveyance to Wray was defective. But the court further held that Glass had perfected his title by adverse possession beyond the statutory period. It will be noted that in this case, the period of time during which Wray held title could not be regarded as part of the required period of adverse possession since his deed was not recorded. North Carolina requires the person claiming title by adverse possession to have been in possession under color of title, and for an instrument to be color of title, it must be recorded. Missouri does not require color of title,[6] therefore following the theory of the *Glass* case, the adverse holder could perfect his title being in possession under an unrecorded instrument.

In *Nowlin v. Reynolds*,[7] Nowlin conveyed to defendant in 1845 or 1846. Defendant took possession, but did not record his deed, and it was lost. In 1846, subsequent to the conveyance to defendant, Nowlin conveyed the same property to Staples in trust to secure a debt. Plaintiff claimed under a trustee's deed from Penn, successor trustee, dated 1869. The court held that defendant's possession was adverse to Knowlin and did not cease to be adverse after the mortgage deed was executed by Nowlin to Staples. Therefore, defendant perfected his title by adverse possession for the statutory period.[8]

As far as any authority has been relied upon in the cases holding as did the *King* case, it is those cases involving a completed sale where the purchaser takes possession but no deed is delivered.[9] The courts, in those cases, are uniform in their decisions that the grantee holds adversely to the grantor and under such circumstances perfects his title by so holding for the statutory period. But it should be remembered that in those cases the grantee never received a good deed which could be recorded.

In *Shaw v. Armstrong*,[10] the Missouri Supreme Court again followed the *King* case. In the *Shaw* case, defendant received a warranty deed in 1930, took and maintained possession until 1948, but did not record his deed. In 1943, the land was bid in at a tax sale by a trustee for the county, but no deed was given under

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5. N. C. GEN. STAT. § 47-18 (1943)—"No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies. . . ."

6. Quick v. Rufe, 164 Mo. 408, 64 S.W. 102 (1901); Wilkerson v. Eilers, 114 Mo. 245, 21 S.W. 514 (1893); Mather v. Walsh, 107 Mo. 121, 17 S.W. 755 (1891).

7. 25 Grat. (66 Va.) 137 (1874).

8. See in *accord:* Grinuk v. Chapin National Bank, 265 Mass. 30, 163 N.E. 559 (1928).

9. Adams v. Wright, 353 Mo. 1226, 187 S.W. 2d 216 (1945); Ridgeway v. Holliday, 59 Mo. 444 (1875).

10. 235 S.W. 2d 851 (Mo. 1951).

the sale until 1948 when a deed was given to the successor trustee for the county who conveyed to plaintiffs. In holding that defendant has sufficient interest in the land to contest the tax deed, the court said: "Thus the evidence shows defendant was in possession of the described land, under a claim of ownership prior to the accrual of a lien for state and county taxes and the alleged foreclosure of the lien by the tax sale under which plaintiffs claim. Under the facts defendant had such possession as to enable him to perfect his title by adverse possession for more than ten years."

Cases found in which the question was in issue have generally held as did the *King* case, but none of them discuss the theory upon which the decision is based. Probably the theory is that an unrecorded deed is a defect in title and may be corrected by adverse possession even though there is no one who can bring an action against the adverse holder until such time as the record owner makes a subsequent conveyance to a third party.

What appeared to trouble the court in the *King* case was finding sufficient interest in plaintiff upon which she could base her attack upon defendants' tax deed. This could have been found by a showing that defendants had actual notice of plaintiff's interest in the property.[11] It was early held in *Vance v. Corrigan*,[12] that a purchaser at a tax sale is in the same position in respect to a prior unrecorded deed as a subsequent purchaser from the record owner. Therefore, the purchaser at a tax sale takes good title as against the holder of an unrecorded deed of which the former had no actual notice.[13]

It is not clear from the record of the *King* case whether or not defendants had actual notice of plaintiff's possession. Defendants indicated that they did not have. But plaintiff testified that her husband told her that Mr. Fasching had been given the money to pay the 1946 city taxes. Also the plaintiff was told by Mrs. Fasching that the defendants had purchased "her property for 1946 taxes." This is some indication that the parties knew one another and that the defendants knew that plaintiff was in possession of the property which under Missouri law is sufficient basis for a finding that defendants had actual notice of plaintiff's unrecorded deed.[14] Whatever were the facts in this regard, the question was not discussed by the court. Neither does the report of the case show in whose name the property was assessed for taxes or what persons were made parties to the tax suit. If the plaintiff was a party to the tax suit, then certainly defendants must have been aware that plaintiff had some interest in the property. It was argued by counsel, and the court held, that the plaintiff's adverse possession for more than ten years gave her good title which was sufficient for her to contest defendants' tax deed.

But even if we may assume that defendants did not have actual notice of plaintiff's unrecorded deed, it still is possible that plaintiff's unrecorded deed along

11. Stuart v. Ramsey, 196 Mo. 404, 95 S.W. 382 (1906).
12. 78 Mo. 94 (1883).
13. See Comment, 16 Mo. L. Rev. 142 (1950), and cases cited therein.
14. *Ibid.*

with her possession, even though unknown to defendants, was sufficient to base an attack upon defendants' tax deed on the basis of inadequate consideration. It is logical that for a subsequent purchaser without actual notice of the prior unrecorded deed to take free of that deed, he must be a bona fide purchaser, and it would seem that one who pays a grossly inadequate consideration for a tax deed to property is not such a bona fide purchaser. That is the very basis upon which the courts set aside tax deeds where the consideration is grossly inadequate.

In *Davis v. Johnson*,[15] plaintiff sold the land to Lynn who gave a note and mortgage on the land to Martin for the purchase money. Martin sold the note and mortgage to Prowell and plaintiff was required to endorse the note. Lynn gave up the land and plaintiff took possession. Plaintiff's only interest in the land was his possession which he claimed to have taken to protect himself on his endorsement. Although plaintiff had been in possession twelve or fifteen years at the time of the tax sale, he made no claim to title by adverse possession, but relied on his mere possession alone, as a basis for contesting the tax deed. The court held that plaintiff's possession with his endorsement on the note gave him sufficient interest in the property because of his subrogation rights upon which to base an attack on a tax deed which was given for a grossly inadequate consideration. The court did not state whether defendant knew of plaintiff's possession nor whether it was necessary for him to have known of the possession. It would be somewhat illogical to say that possession merely for the protection of subrogation rights under an endorsement on a note is sufficient interest to contest a tax deed and yet hold that possession under an unrecorded deed is insufficient.

Whether an unrecorded deed alone without possession would give the holder thereof sufficient interest to contest a tax deed in Missouri, is not certain. Again it would seem logical that it should be sufficient since the purchaser at the tax sale must be a bona fide purchaser in order to cut off the interest under the unrecorded deed. But in *Scott v. Unknown Heirs of Garrison*,[16] the defendant claimed under an unrecorded deed, but had never been in possession of the property and had never paid any of the taxes. Plaintiff purchased at a tax sale without actual notice of defendant's interest. The court held that the defendant did not have sufficient interest in the property to contest plaintiff's tax deed on the basis of grossly inadequate consideration. No deed was introduced into evidence, and the only evidence of defendant's interest shown in the report of the case was defendant's own testimony that he had received a deed to the property but had not recorded it. The case is not clear whether the decision was based upon defendant's failure to prove that he had ever received a deed, or whether it was necessary to contest a tax deed. McDowell, Judge, said: "Certainly the evidence shows that defendant had no record title. It also is undisputed that he never had possession of the property under claim of ownership so as to give him a right by adverse possession. He paid no taxes thereon nor made any improvements. The only evidence he has,

15. 357 Mo. 417, 208 S.W. 2d 266 (1948).
16. 235 S.W. 2d 372 (Mo. 1951).

showing an interest in this property, is that he claims it was conveyed to him by a deed many years ago, which he never recorded. The evidence is wholly insufficient on the part of defendant to show a claim or interest in the land in question so as to give him a right to challenge the sufficiency of the [tax] deed."

Another factor in the *Scott* case which may have influenced the court in its decision was defendant's refusal to tender payment for improvements which plaintiff had made on the property.

The *King* case and the *Shaw* case possibly give rise to an exception to the rule in Missouri that possession is evidence only of actual notice of the unrecorded deed on the part of the subsequent purchaser from the record owner. It was held in *Hendrix v. Galloway*,[17] that the registry acts do not protect a purchaser from the record owner as against a title acquired by adverse possession. It was held in *Ridgeway v. Holliday*,[18] that an innocent purchaser by deed without general warranties did not take title superior to a title acquired by adverse possession because the absence of general warranties was sufficient to put the purchaser on inquiry. Since the statutes made no provision for recordation of a title acquired by adverse possession, rights as between the adverse title holder and a subsequent purchaser from the record owner would be governed by common law, and the purchaser would take only such title as his vendor had. Therefore after the holder of an unrecorded deed has perfected his title by adverse possession, his title would be good as against a subsequent purchaser from the record owner, even though the subsequent purchaser had no knowledge whatever of circumstances which would put him on inquiry. No cases have been found of such a rule being applied where the subsequent purchaser took by general warranty deed, but the cases hold that title acquired by adverse possession is as good in every respect as if the holder thereof had perfect record title.[19] Under such a theory, once the title has been acquired by adverse possession, the adverse title holder would not even have to maintain his possession in order to have title superior to that acquired by subsequent purchaser from the record owner. It was so held in the *Ridgeway* case where the subsequent purchaser took by deed without general warranties. In view of this theory perhaps it might be desirable to have some system for getting title acquired by adverse possession on the records. But here again a problem would arise in view of the fact that often the adverse title holder does not know that there is a defect in his record title until it is questioned in court.

BRUCE A. RING*

17. 211 Mo. 536, 111 S.W. 60 (1908).
18. 54 Mo. 444 (1875).
19. Ridgeway v. Holliday, *supra* note 8; Biddle v. Mellon, 13 Mo. 355 (1950).

*Attorney with Missouri State Highway Department and former student editor of the *Review*. A.B., 1949, LL.B., June 1951, University of Missouri.